Consumer Federation of America

Public Knowledge

March 30, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Dear Ms. Dortch:

The Consumer Federation of America (CFA) and Public Knowledge (PK) have participated extensively in the ongoing Business Data Services (BDS) proceeding.[1] We are writing to the Federal Communications Commission (FCC or Commission) to heed the evidentiary record in this proceeding and call on the Commission to reject proposals from the dominant incumbent providers of business data services (BDS) that would deregulate a market in which they have massive market power. Consumers are already overcharged in this market; allowing incumbent providers to raise prices and increase their profits through deregulatory measures would make matters worse. The resulting overcharges would rob consumers of tens of billions of dollars per year.

Recent filings by incumbent telecommunications providers in the FCC's long-running BDS proceeding request further deregulation of the business broadband market, and would result in higher prices

[1] In the current round of analysis and comments, CFA submitted an economic study in the record on April 7, 2016 followed by initial comments with the New Network Institute (June 29, 2016) and reply comments (August 9, 2016). The hearing record also includes and *ex parte* conversation the FCC general council on July, 28, 2009 that on that dealt with some of the issues raised in this proceeding and this letter. Public Knowledge also submitted comments (June 28, 2016), reply comments (August 9, 2016), and numerous *ex parte* submissions during the most recent comment period.

for essential connectivity for large and small businesses, community anchor institutions like schools and libraries, and state and local governments. The FCC's record in the BDS docket does not support additional deregulation; in fact, the record demonstrates that business customers already pay supracompetitive prices and have few, if any choice of providers. Ultimately, these excessive rates are passed on to consumers.

Billions of Dollars per Year are Drained from Consumer Pocketbooks as a Result of this Illegal and Abusive Behavior

The importance of BDS has been increasing sharply as digital communications become a critically important input to in economic activity. This is the choke point of connectivity in the digital age. This chokepoint totally dominated by the incumbent local exchange carriers, above all AT&T, Verizon, and CenturyLink. Recently, the FCC engaged in the most extensive data gathering effort in the agency's history. The data showed that the vast majority of consumers (over three quarters) have only a monopoly business broadband supplier. An additional ten percent were served by only two providers.

Businesses have little or no choice when it comes to purchasing essential connectivity, and a result we estimated that U.S. businesses pay approximately $20 billion in overcharges. Historical experience and the contemporary evidence gathered by the FCC indicate that further deregulation of BDS service could increase the rates that businesses pay for broadband by 25%, adding between $10 and $20 billion to total overcharges.

The costs businesses incur to connect ATMs, credit card readers, and other devices connected to the internet are intermediate costs that businesses incur in producing the goods and services that the public consumes. Like fuel, rent and wages, they must be recovered as routine costs of doing business. The tooth fairy doesn't pay them, the consumer does. Currently, overcharges total between $150 per household. Premature deregulation of the BDS market, as proposed by the largest incumbent providers, will add result in higher costs for consumers of additional $150 per year.

The FCC appears poised to take steps consistent with the deregulatory proposals of the dominant incumbent BDS providers. However, those proposals are based on the faulty assumptions about the market structure that are inconsistent with the record in this proceeding.

The Basic Assumptions and Definitions in the Dominant Incumbent Proposals are Erroneous

First, geographic market definition that the dominant incumbents propose is far too broad. The record demonstrates that the market must be defined at the building level because that is the level at which consumers purchase these services. The incumbent's stance that theoretical new competitors will enter the market and that this specter of new competition will discipline prices is misguided. The Commission has long proven itself incapable of predicting future BDS competition, and the FCC's prior failures have resulted in the existing excessively high prices and few competitive choices for businesses broadband customers. The Commission should not repeat this mistake. Further, premature deregulation in reliance on potential competition is inconsistent with the record, which shows that the cost of extending lines to additional buildings is prohibitive, at even relatively short distances. Competition has not developed precisely because this cost barrier to entry it so high. Therefore, the geographic market must be narrowly defined.

Second, the product market definition that the dominant incumbent providers propose is far too broad. The incumbent telecommunications providers assert that "best effort" services by cable companies is a substitutable service and a competitor to high capacity business broadband services. In reality, "best efforts" cable services are merely repurposed residential service quality internet services, and the record is replete with evidence that these services are not substitutable services and cannot constrain incumbent pricing power.

Last, the definition of a workably competitive market offered by the dominant incumbents is incorrect, unsupported by economic theory and legal practice, and thoroughly contradicted by the record in this proceeding. Two competitors is simply not enough to render a market workably competitive, certainly not under the basic and market conditions (e.g. low elasticity of demand, high barriers to entry, important switching costs) that obtain in the BDS market. With respect to the number of competitors necessary to identify a competitive market we concluded that "four is few, six may be enough, and ten is workably competition.

This conclusion was supported by the evidence in this proceeding. Defining product and geographic market and the potential entrants reasonably, econometric analysis of the pricing data shows that the presence of four actual competitors lowers price by 28% and the addition of four potential competitors increases the price reduction to 43%. The threshold for a market to be assumed to be workably competitive should be four actual and four potential competitors."

The FCC evidence demonstrated and the FCC concluded that this "tight oligopoly on steroids" had abused its maker power in two fundamental ways. First, they impose contract terms on consumers that freeze out competition. Second, they raise prices to achieve profits that are not merely "supranormal," as economists put it, but are astronomical.

Current Rates are Illegal as are the Deregulation Proposals of the Dominant Incumbents

Based on the record in this proceeding, it is clear that current rates are not just and reasonable under sections 201 and 202 of the act. The hope that competition would develop to make regulation no longer necessary in the public interest has failed to come to pass. The dominant firms in this market possess market power and have abused it to set rates terms and conditions that are not just and reasonable.

Based on the record in this proceeding, we believe that the rates charged embody massive cross-subsidies supporting the more competitive offerings of service providers. This violate the explicit ban on such services under Section 254 of the Act.

Finally, the severe abuse of market power slows and distorts the deployment of broadband. Dominant incumbents would prefer to reap massive profits on older services than provision newer, more high capacity facilities. The output of businesses that sell services and applications that could stimulate demand for their services is suppressed, thereby further slowing the deployment and adoption of broadband service. This makes the abusive rates terms and conditions imposed on the market an ideal target for action under Section 706 of the Act.

The record does not support a finding that BDS markets are competitive and that additional deregulation is warranted. In fact, the opposite is true. Additional deregulation will lead to higher prices on business broadband customers, creating substantial deadweight loss throughout the economy, raising costs for consumers, and reducing economic growth.

Sincerely,

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